

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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TERRENCE TERRELL MOORE,

Petitioner,

Case No. 1:20-cv-1107

v.

Honorable Paul L. Maloney

BRYANT MORRISON,

Respondent.

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**OPINION**

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2241.<sup>1</sup>

Promptly after the filing of a petition for habeas corpus, the Court must undertake a preliminary review of the petition to determine whether “it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court.” Rule 4, Rules Governing § 2254 Cases; *see* 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; *see Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to “screen out” petitions that lack merit on their face). A dismissal under Rule 4 includes those petitions which raise legally frivolous claims, as well as those containing factual allegations that are palpably incredible or false. *Carson v. Burke*, 178 F.3d 434, 436-37 (6th Cir. 1999). After

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<sup>1</sup> Although Petitioner brings his action under 28 U.S.C. § 2241, habeas corpus actions brought by “a person in custody pursuant to the judgment of a State court” are governed by 28 U.S.C. § 2254. *Id.* Section 2254 “allows state prisoners to collaterally attack either the imposition or the execution of their sentences[.]” *Bailey v. Wainwright*, 951 F.3d 343, 348 (6th Cir. 2020) (Stranch, J., dissenting) (quoting *Allen v. White*, 185 F. App’x 487, 490 (6th Cir. 2006)); *see also Rittenberry v. Morgan*, 468 F.3d 331, 336-37 (6th Cir. 2006). As a consequence, Petitioner’s filing is subject to all of the requirements that apply to a petition filed under § 2254. Moreover, § 2241 petitions by state prisoners are subject to the rules governing § 2254 petitions. *See Rule 1(b), Rules Governing § 2254 Cases.*

undertaking the review required by Rule 4, the Court will dismiss the petition without prejudice for failure to exhaust available state-court remedies.

### **Discussion**

#### **I. Factual allegations**

Petitioner Terrence Terrell Moore is incarcerated with the Michigan Department of Corrections (MDOC) at the Lakeland Correctional Facility in Coldwater, Michigan. Petitioner is serving a sentence of life imprisonment for first-degree murder as well as sentences for larceny and weapons offenses. The Oakland County Circuit Court imposed the sentences following a jury's determination that Petitioner was guilty of those offenses.

On September 15, 2020, Petitioner filed his habeas corpus petition with the United States District Court for the Eastern District of Michigan. On November 17, 2020, the Eastern District of Michigan transferred the petition to this Court. The petition alleges that the risk of infection arising from the COVID-19 pandemic<sup>2</sup> renders Petitioner's continued imprisonment a violation of Petitioner's Fifth Amendment rights.<sup>3</sup> (Pet., ECF No. 1, PageID.2.) Petitioner also raises a claim under the Rehabilitation Act of 1973, 29 U.S.C. § 794.<sup>4</sup> (*Id.*)

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<sup>2</sup> In *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020), the Sixth Circuit described the COVID-19 problem as follows:

The COVID-19 virus is highly infectious and can be transmitted easily from person to person. COVID-19 fatality rates increase with age and underlying health conditions such as cardiovascular disease, respiratory disease, diabetes, and immune compromise. If contracted, COVID-19 can cause severe complications or death.

*Wilson*, 961 F.3d at 833.

<sup>3</sup> Petitioner also states that his confinement under the present conditions might violate the Eighth Amendment prohibition of cruel and unusual punishments. (Pet., ECF No. 1, PageID.7, 17, 19) ("Multiplicity of punishment exist arising a security issue over a health crisis from a deadly disease that's cruel and unusual . . ." and "Respondents act with deliberate indifference to the excessive risk of harm to Petitioner's health and safety posed by COVID-19" and "Respondent's actions amount to and are intended as further punishment and violate Petitioner's . . . 8th Amendment [rights]").

<sup>4</sup> Petitioner states: "Respondents fail to 'reasonably accommodate' Petitioner's disabilities by failing to ameliorate the conditions 'COVID-19 imposes' the conditions that prevent Petitioner from employing the only known means of

Petitioner seeks immediate release from the Lakeland Correctional Facility; however, in the event the Court denies that relief, he seeks “declaratory and injunctive relief to compel Respondents to provide such safe conditions [as] is needed to remedy Respondent’s violations of the Fifth Amendment and [enjoin] Eighth Amendment violation . . . .” (Pet., ECF No. 1, PageID.20.)

## **II. Availability of § 2254 relief for unconstitutional conditions of confinement**

Petitioner’s request for relief is not a typical habeas claim. The Supreme Court has made clear that constitutional challenges to the fact or duration of confinement are the proper subject of a habeas corpus petition rather than a complaint under 42 U.S.C. § 1983. *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973). Constitutional challenges to the conditions of confinement, on the other hand, are proper subjects for relief under 42 U.S.C. § 1983. *Id.* The *Preiser* Court, however, did not foreclose the possibility that habeas relief might be available even for conditions of confinement claims:

This is not to say that habeas corpus may not also be available to challenge such prison conditions. *See Johnson v. Avery*, 393 U.S. 483, (1969); *Wilwording v. Swenson*, *supra*, at 251 of 404 U.S. . . . When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal. *See Note*, Developments in the Law—Habeas Corpus, 83 Harv. L. Rev. 1038, 1084 (1970).[]

*Preiser*, 411 U.S. at 499 (footnote omitted). But, the Court has also never upheld a “conditions of confinement” habeas claim. Indeed, in *Muhammad v. Close*, 540 U.S. 749 (2004), the Court acknowledged that it had “never followed the speculation in *Preiser* . . . that such a prisoner subject to ‘additional and unconstitutional restraints’ might have a habeas claim independent of § 1983 . . . .” *Id.* at 751 n.1.

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protecting himself from infection or by failing to release Petitioner from the correctional facility of Lakeland.” (Pet., ECF No. 1, PageID.22.)

The Sixth Circuit has concluded that claims regarding conditions of confinement are properly brought under § 1983 and are not cognizable on habeas review. *See Martin v. Overton*, 391 F.3d 710, 714 (6th Cir. 2004) (“Petitioner in this case appears to be asserting the violation of a right secured by the federal Constitution or laws by state prison officials. Such a claim is properly brought pursuant to 42 U.S.C. § 1983.”); *In re Owens*, 525 F. App’x 287, 290 (6th Cir. 2013) (“The criteria to which Owens refers involves the conditions of his confinement . . . . This is not the proper execution of sentence claim that may be pursued in a § 2254 petition.”); *Hodges v. Bell*, 170 F. App’x 389, 392-93 (6th Cir. 2006) (“Hodges’s complaints about the conditions of his confinement . . . are a proper subject for a § 1983 action, but fall outside of the cognizable core of habeas corpus relief.”); *Young v. Martin*, 83 F. App’x 107, 109 (6th Cir. 2003) (“It is clear under current law that a prisoner complaining about the conditions of his confinement should bring suit under 42 U.S.C. § 1983.”).

Petitioner’s claims regarding the constitutionality of his custody because of risks posed by COVID-19 appear on their face to be claims regarding the conditions of his confinement. Such claims should be raised, typically, by a complaint for violation of 42 U.S.C. § 1983.

Nonetheless, Petitioner’s requests as relief release from custody. That relief is available only upon habeas corpus review. “The Supreme Court has held that release from confinement—the remedy petitioner[] seek[s] here—is ‘the heart of habeas corpus.’” *Wilson*, 961 F.3d at 868 (quoting *Preiser*, 411 U.S. at 498).<sup>5</sup> A challenge to the fact or duration of confinement should be brought as a petition for habeas corpus and is not the proper subject of a civil rights action brought pursuant to § 1983. *See Preiser*, 411 U.S. at 484 (the essence of habeas corpus is

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<sup>5</sup> The *Wilson* petitioners were federal prison inmates who brought habeas claims under 28 U.S.C. § 2241 similar to those claims brought by Petitioner.

an attack by a person in custody upon the legality of that custody and the traditional function of the writ is to secure release from illegal custody).

In *Wilson*, the Sixth Circuit stated: “[o]ur precedent supports the conclusion that where a petitioner claims that no set of conditions would be constitutionally sufficient the claim should be construed as challenging the fact or extent, rather than the conditions, of the confinement.” *Wilson*, 961 F.3d at 838. Petitioner, like the petitioners in *Wilson*, contends there are no conditions of confinement sufficient to prevent irreparable injury at the facility where he is housed. Accordingly, the Court construes his claim as a proper claim for habeas relief. Nonetheless, because Petitioner has chosen to pursue relief by way of a habeas petition, the available relief is circumscribed. *Wilson*, 961 F.3d at 837. Even if there might be conditions of confinement, short of release, that would mitigate the risk—and eliminate the cruel or unusual character of the punishment—it is not within this Court’s habeas jurisdiction to grant such relief. *Id.* A claim seeking relief other than release—the relief Petitioner seeks in the alternative here—is properly brought under 42 U.S.C. § 1983.

### **III. Exhaustion of State Court Remedies**

Before the Court may grant habeas relief to a state prisoner, the prisoner must exhaust remedies available in the state courts. 28 U.S.C. § 2254(b)(1); *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Exhaustion requires a petitioner to “fairly present” federal claims so that state courts have a “fair opportunity” to apply controlling legal principles to the facts bearing upon a petitioner’s constitutional claim. *Id.* at 844, 848; *see also Picard v. Connor*, 404 U.S. 270, 275-77 (1971); *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Anderson v. Harless*, 459 U.S. 4, 6 (1982). To fulfill the exhaustion requirement, a petitioner must have fairly presented his federal claims to all levels of the state appellate system, including the state’s highest court. *O’Sullivan*, 526 U.S. at 845; *Wagner v. Smith*, 581 F.3d 410, 414 (6th Cir. 2009); *Hafley v. Sowders*, 902 F.2d

480, 483 (6th Cir. 1990). The district court can and must raise the exhaustion issue *sua sponte* when it clearly appears that habeas claims have not been presented to the state courts. *See Prather v. Rees*, 822 F.2d 1418, 1422 (6th Cir. 1987); *Allen v. Perini*, 424 F.2d 134, 138-39 (6th Cir. 1970).

Petitioner bears the burden of showing exhaustion. *See Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). Petitioner has neither alleged that he exhausted his claims in the state courts nor provided any documentation indicating that he has pursued such state remedies.<sup>6</sup> Instead, Petitioner posits that he is not required to exhaust state administrative remedies because there are no such available remedies. Section 2254 does not require the exhaustion of administrative remedies, the section requires exhaustion of remedies available in the state courts. Petitioner simply ignores that requirement. Nonetheless, the Court will construe Petitioner's claim that there are no effective administrative remedies as a request that the Court to relieve him of the exhaustion requirement under § 2254(b)(1)(B)(ii).

Subsection (b) of § 2254 precludes the Court from granting habeas relief unless Petitioner has exhausted his claims in state court. A petitioner's failure to exhaust may be excused if "there is an absence of State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B). Petitioner does not claim that there is an absence of state corrective process. Instead, by claiming he is in imminent danger, and by seeking emergency injunctive relief, Petitioner presumably intends to invoke the latter exception: that circumstances have made the state's corrective process ineffective. However, he has failed to allege how the present circumstances have rendered state court remedies ineffective.

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<sup>6</sup> Indeed, given the recency of the events giving rise to Petitioner's claim, it would appear to be impossible for Petitioner to have exhausted state court remedies before filing the petition.

An applicant has not exhausted available state remedies if he has the right under state law to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(c). Petitioner has at least one available procedure by which to raise the issues he has presented in this application. Petitioner has already filed multiple motions for relief from judgment permitted under the Michigan Court Rules. *See* [https://courts.michigan.gov/opinions\\_orders/case\\_search/pages/default.aspx?SearchType=2&PartyName=moore+terrence&CourtType\\_PartyName=3&PageIndex=0&PartyOpenOnly=0](https://courts.michigan.gov/opinions_orders/case_search/pages/default.aspx?SearchType=2&PartyName=moore+terrence&CourtType_PartyName=3&PageIndex=0&PartyOpenOnly=0) (visited November 18, 2020). Nonetheless, the state rules permit a successive motion if it is “based on . . . a claim of new evidence that was not discovered before the first such motion.” Mich. Ct. R. 6.502(G)(2). Petitioner could not have discovered the facts underlying his present claims before he filed his previous motions, all of which were filed long before the first COVID-19 case in this country.

Moreover, relief may be available to Petitioner by way of a habeas corpus petition in state court in that he seeks a determination “whether his continued custody is legal.” *Phillips v. Warden, State Prison of S. Mich.*, 396 N.W.2d 482, 486 (Mich. Ct. App. 1986). Alternatively, Petitioner may seek relief, even release, by civil action in state court for unconstitutional conditions of confinement. *See Kent Cnty. Prosecutor v. Kent Cnty. Sheriff*, 409 N.W.2d 202, 208 (Mich. 1987) (“No one now doubts the authority of courts to order the release of prisoners confined under conditions violating their Eighth and Fourteenth Amendment rights.”). Therefore, the Court concludes that he has at least one available state remedy.

To properly exhaust his claim, Petitioner must present his claim to each level of the state court system. *O’Sullivan*, 526 U.S. at 845; *Hafley*, 902 F.2d at 483 (“[P]etitioner cannot be deemed to have exhausted his state court remedies as required by 28 U.S.C. § 2254(b) and (c) as

to any issue, unless he has presented that issue both to the Michigan Court of Appeals and to the Michigan Supreme Court.””) (citation omitted).

Because Petitioner has failed to exhaust his claims, his petition is properly dismissed without prejudice. The habeas statute imposes a one-year statute of limitations on habeas claims. *See* 28 U.S.C. § 2244(d)(1). Petitioner’s period of limitation commenced running when “the factual predicate of his claim . . . could have been discovered through the exercise of reasonable diligence.” 28 U.S.C. §2244(d)(1)(D). Certainly, Petitioner could not have discovered his claim before March of this year.

The limitations period is not tolled during the pendency of a federal habeas petition. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001). However, the period is tolled while an application for state post-conviction or collateral review of a claim is pending. 28 U.S.C. § 2244(d)(2). The statute of limitations is tolled from the filing of an application for state post-conviction or other collateral relief until a decision is issued by the state supreme court. *Lawrence v. Florida*, 549 U.S. 327 (2007).

In *Palmer v. Carlton*, 276 F.3d 777 (6th Cir. 2002), the Sixth Circuit considered what action the court should take if the dismissal of a petition for failure to exhaust could jeopardize the timeliness of a subsequent petition.<sup>7</sup> The *Palmer* court concluded that if the petitioner had more than 60 days remaining in the period of limitation—30 days to raise his unexhausted claims and 30 days after exhaustion to return to the court—no additional protection, such as a stay, was warranted. *Id.*; *see also Rhines v. Weber*, 544 U.S. 269, 277 (2007) (approving stay-and-abeyance procedure); *Griffin v. Rogers*, 308 F.3d 647, 652 n.1 (6th Cir. 2002).

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<sup>7</sup>The *Palmer* court considered the issue in the context of a “mixed” petition including exhausted and unexhausted claims. The *Palmer* court’s explanation of when dismissal of a petition does not jeopardize the timeliness of a subsequent petition, however, is persuasive even where the petition includes only unexhausted claims.

Petitioner has far more than sixty days remaining in his limitations period. Assuming that Petitioner diligently pursues his state-court remedies and promptly returns to this Court after the Michigan Supreme Court issues its decision, he is not in danger of running afoul of the statute of limitations. Therefore, a stay of these proceedings is not warranted, and the Court will dismiss the petition for failure to exhaust available state-court remedies.

**IV. Motion to proceed *in forma pauperis* (ECF No. 2)**

Petitioner has requested leave of court to proceed *in forma pauperis* (ECF No. 2) under 28 U.S.C. § 1915(a)(1) and has filed an affidavit of indigence. It reasonably appears that paying the cost of this filing fee would impose an undue financial hardship. *Prows v. Kastner*, 842 F.2d 138, 140 (5th Cir. 1988). Therefore, the Court will grant Petitioner's application for leave to proceed *in forma pauperis*.

**V. Certificate of Appealability**

Under 28 U.S.C. § 2253(c)(2), the Court must also determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a “substantial showing of a denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (per curiam). Rather, the district court must “engage in a reasoned assessment of each claim” to determine whether a certificate is warranted. *Id.*

The Court has concluded that Petitioner's application is properly denied for lack of exhaustion. Under *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), when a habeas petition is denied on procedural grounds, a certificate of appealability may issue only “when the prisoner shows, at least, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the

district court was correct in its procedural ruling.” Both showings must be made to warrant the grant of a certificate. *Id.*

The Court finds that reasonable jurists could not find it debatable whether Petitioner’s application should be dismissed for lack of exhaustion. Therefore, a certificate of appealability will be denied. Moreover, for the same reasons the Court will deny a certificate of appealability, the Court also concludes that any issue Petitioner might raise on appeal would be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

### **Conclusion**

The Court will enter an order and judgment dismissing the petition for failure to exhaust state-court remedies, granting Petitioner’s request to proceed *in forma pauperis* (ECF No. 2), and denying a certificate of appealability.

Dated: November 30, 2020

/s/ Paul L. Maloney  
Paul L. Maloney  
United States District Judge